

‘Survival of the Fittest’: Future Directions of the Senate

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The future direction of the Australian Senate and Senate reform continues to excite enormous public interest if measured by column inches in editorials and opinion pieces in the press. As Robert Manne wrote recently:

No political question matters more in contemporary Australia than the composition of the Senate. No constitutional question is more fraught with complexity than the relations between Government in Australia and the Upper House.¹

If the questions are complex, two underlying facts are starkly simple:

- With proportional representation as the chosen voting method to elect senators, together with the 1984 increase in the number of senators from 10 to 12 per state, neither of the major parties in the Senate will have a workable majority in the foreseeable future, if ever again; and
- With the major party in opposition largely dealing itself out of the game by wholesale opposition to a government’s agenda, the casting vote on important national legislation will remain with the minor parties.

What do these facts mean?

At the very least, these facts mean delay and, at times, an inhibition on the part of government to respond in necessary and effective ways to matters requiring both international and national attention. At worst, they mean policy gridlock with no effective constitutional means of resolving entrenched conflict, short of dissolving both houses of parliament and sending the country to a general election.

¹ Robert Manne, *Age* (Melbourne), 5 July 1999.

Of course, prudential politics usually prevail, so that depending on who in the minor parties is prepared to deal with the government, compromises are made that allow some version of the contentious legislation to pass.

But what are the consequences of this deal-making?

Eleventh hour deals over Wik, Telstra and the goods-and-services tax raise fundamental questions for governance of the country quite apart from political expediency. Certainly it can be argued that such compromises represent a harmonisation of diverse views and show representative democracy at work. Others would say that better legislation results from consensus building even if, on occasions, it may reflect some highly idiosyncratic personal agendas.

But were these the best possible outcomes in terms of the national interest or do these 'compromise agreements' represent special interest pay-offs and deliver third-best outcomes? And importantly, what message does this send to an already disillusioned and disenchanted electorate? Does the electorate accept that politics is the art of the possible and that the Senate has a pivotal role in finding a political solution, or is the will of the electorate frustrated by a government's inability to deliver substantial policy outcomes that have been promised?

Underpinning policy gridlock in the Senate is another serious policy issue—the inadequate constitutional mechanism for resolving deadlocks. But a Senate deadlock has far more profound political implications. Unless a government is prepared to accept substantial modification to its policy positions, the only constitutional option for resolving deadlocks requires a double dissolution and a fresh election.

One particularly adverse consequence is that a government may be tempted to give up on the promises it took to an election rather than put the nation through another election. Worse still, experience in the Senate indicates that necessary reforms may be rejected if unpopular, regardless of their merits. Hard decisions made in the national interest are liable to be sacrificed to populism and political opportunism, whatever political spin may be put on it.

Clearly, a modern parliamentary democracy needs more than one possible means by which deadlocks can be resolved. I will return to this later.

Another institutional problem with the Senate and more broadly with the Australian political system is that it was designed to meet the requirements of a different age. The fledgling Federation, in which communication across a vast land with scattered populations took weeks, required both gradualism and compromise to take account of distance and regional differences. These obstacles no longer determine how and when Australia does business, the speed of communication or how effectively individual states and territories can be represented.

Speaking at the Australia Unlimited Conference, the *Australian's* international editor Paul Kelly pointedly observed, 'Compared to the speed of decision-making in the market-place, parliamentary democracy is hopelessly old-fashioned.'²

² Paul Kelly, 'The New Social Glue', Australia Unlimited Conference, 4 May 1999.

Globalisation, including the ability to move capital and to choose the most favourable tax environment at the click of a mouse, have weakened the power of national governments. The future lies in international and regional co-operation on matters as diverse as trade to the protection of intellectual property rights on the Internet. Our future prosperity is dependent on our competitive advantage in the global environment that will make it an attractive place to invest, and provide jobs and security for our citizens.

What has this got to do with future directions of the Senate?

The Senate processes—and in particular the need to stitch up a negotiated coalition for every contested bill—are simply not designed to meet the requirements of the information age. For example, legislation concerning digital communication can be close to obsolete before it is passed, with technological advances outstripping the legislative time frame.

Although not given much media attention, the business community was understandably up in arms about the long delays to the Howard government's financial reform timetable. Key measures such as relaxing off-shore banking unit regulations, a tightening of thin capitalisation rules, and changes to withholding tax arrangements were stuck in the Senate for just over two years, with passage on the last day of the winter sittings under the guillotine. The introduction of rules on superannuation choice have still not been passed.

As it happened, many of these measures when finally debated were relatively uncontroversial.

The problem is that legislative traffic in the Senate is so slow, the static and posturing so loud, and the delaying tactics so time consuming that sensible, necessary reforms get pushed into the background. In my view, Australia cannot afford such a leisurely and haphazard approach to decision-making. To quote Kelly again, 'We need to ensure that parliamentary democracy survives globalisation. It may be a close-run thing.'³

So, what are the obstacles to a more forward looking and responsive Senate?

Leaving aside for a moment the constitutional constraints on reforming the Senate, the last few months of debate have crystallised what I think is the most cogent argument advanced against Senate reform. That is, that if the government controlled the Senate, it would be reduced to little more than a rubber stamp for the executive.

Implicit in this argument are the assumptions that the Senate provides the only effective check on the executive and restraint is only possible because the executive does not control it. Further, that if the Senate's powers were modified, or if it were controlled by the executive, it would be pointless to retain it.

While plausible, in my view these assumptions are unsustainable.

³ Kelly, *op. cit.*

Australia is the only country in which the upper house has such constitutional power, yet representative democracy survives and thrives in many other countries. Every other broadly comparable parliamentary democracy has managed to put into place transparent and accountable processes, without a controlling upper-house gatekeeper. For example, there are few indications that the House of Lords stands as the only bulwark between the Labor government and tyranny of the British people. The democratic right to throw out a government via the power of the ballot box is not the only check on the British government.

In fact, only 15 Commonwealth members have upper houses at all and many of these, including Britain, are searching to ensure sufficient popular legitimacy to avoid redundancy.

This raises the question of whether an institutional design that challenges the conventional rule—that in a bicameral parliament one chamber has primacy and the government cannot be responsible to two⁴—is absolutely necessary. The experience of other parliamentary democracies without a constitutional gatekeeper suggests that ultimately little useful purpose is served by a system requiring a double majority for the passage of all legislation when conflict is its mode of operation and policy gridlock is almost an inevitable consequence.

Unlike many upper houses, the Australian Senate has a powerful popular legitimacy derived from its voter base and demonstrated by the 25 per cent support for non-major parties at the last election. The fact that some 9 per cent of that vote remains largely unrepresented in the Senate is another issue.

The relevant question is how a popularly elected upper house fulfils its constitutional function without making it impossible or at least highly problematic for a government elected in the lower house to govern in the national interest.

Even a passing familiarity with what the Senate actually does is sufficient to conclude that not only does the Senate do invaluable work, but it has an indispensable role in our parliamentary system quite independent from second-guessing the government of the day. Although by no means an exhaustive list, the following functions justify the role of the modern Senate:

- As a scrutineer and reviewer of bills, the Senate has an invaluable role. Bills get knocked into shape in the Senate and many amendments are not only justified, but clearly necessary. Many amendments are, in fact, government amendments. Some bills manage to pass through the House of Representatives with seemingly scant attention to detail. The Senate does the hard work of refining and of improving the quality of legislation.
- The Senate has a unique role as the overseer of delegated legislation. The Senate Standing Committee on Regulations and Ordinances (which is the oldest Senate standing committee, dating back to 1932), operates essentially on a bipartisan basis and provides critical oversight of the Executive's regulation-making powers.

⁴ Alan J. Ward, 'Australian and Parliamentary Orthodoxy: a Foreign Perspective on Australian Constitutional Reform', Senate Occasional Lecture Series, Canberra, 18 June 1999.

Disallowance of regulations made by the Executive government is not uncommon. There has been an enormous proliferation of regulation making by the Executive and the Senate provides the only scrutiny of such actions. Since 16 July 1997, this committee has scrutinised 3559 disallowable instruments of delegated legislation and detected 502 apparent defects and matters worthy of mention under its principles.⁵

- The Senate committee system is capable of, and often does, very good work. Senators from all parties make significant contributions. It allows community groups, interest groups, industry, business and individuals to have access to their elected representatives both on bills and broader issues. However, a significant drawback of the committee system is that the process is usually hijacked for partisan purposes and inquiries tend to reflect party positions. This subverts the objectivity of the inquiry. Committees are also often used to delay and obfuscate rather than genuinely to inquire into the bills or subject matter.

In this volume, Ian Marsh makes constructive suggestions as to how the Senate committee system might be used more productively at an earlier stage of policy development similar to the early Senate inquiries in the decade after Federation. There is much to be said for this. However, the raw politics of disciplined parties in the Senate suggests that his model may run into difficulties.

- The Senate is undoubtedly the guardian of human rights and individual liberties and has carved out a specialised role, not mirrored in the House of Representatives, to examine bills for infringement of rights.
- In theory at least, the Senate provides a broader and more diverse representative base than does the House of Representatives.

The upshot of this list is that the Senate does have a valuable role in representative parliamentary democracy—one that should be both valued and enhanced.

How can this valuable role be achieved?

I have previously advocated the need for a vigorous public debate on the question of Senate reform and have suggested a range of options for discussion.⁶ In this paper, I want to concentrate on just two: one involves a new direction for multi-party decision making, and the other requires constitutional change.

It has been said that the problem with the Senate is not so much its design, but rather the uncompromising exploitation of its processes by disciplined political parties. After all, balance-of-power politics is only possible if the major parties are implacably

⁵ The Regulations and Ordinances Committee, *Annual Report 1996–1997*, 105th Report, June 1998. The Regulations and Ordinances Committee, *Annual Report 1997–1998*, 106th Report, March 1999. Statement of Work of the Committee During The Spring Sittings 1998, *Commonwealth Parliamentary Debates* 9 December 1998, p. 1588. Statement of Work of the Committee during the Autumn and Winter Sittings, 30 June 1999, p. 6942.

⁶ Senator Helen Coonan, ‘The Senate: safeguard or handbrake on democracy’, Address to the Sydney Institute, 3 February 1999.

opposed. But such politics in the Senate need not always be characterised by conflict. As Marsh suggests, there may be some mutation in party politics to allow opportunities for consensus building on policy before legislation is developed. Earlier consensus building may see the major political parties negotiate and declare coalitions of interest with balance-of-power parties *before elections* rather than negotiating a coalition of support for contested legislation on a piecemeal basis after elections. This would both better inform the electorate and have the potential to avoid the kind of entrenched conflict that has characterised a great deal of the Senate's operation in recent years.

The other change that is logical, if difficult to achieve, is an additional constitutional means for solving genuine deadlocks. The 1959 Report of the Joint Committee on Constitutional Review⁷ included in its recommendations dealing with disagreements between the Senate and the House of Representatives, the option to convene a joint sitting to resolve a deadlock. This would be an alternative to the present requirement for a double dissolution and general election before holding a joint sitting.

Obviously one size does not fit all situations. It was thought that the joint sitting option without a double dissolution would be appropriate where a deadlock arose early in the term of a new government. The double dissolution route might still be required if a joint sitting did not resolve the disagreement. Forty years later, there is a compelling case to revisit these recommendations. A joint sitting is simply a special mode of passing legislation. Interposing a double dissolution and a general election does not alter the ultimate constitutional intent that in the event of deadlock, the wishes of the majority of representatives of the people voting as a whole will prevail. It is the clearest possible indication that despite the Senate's unique co-equal powers in a bicameral parliament, those powers may be subordinated to the national interest.

Whether or not the Senate (or the parties represented in the Senate) adopt any of these reforms remains to be seen. My point is that a model that institutionalises conflict as its mode of operation is hardly representative of the new directions for dispute resolution that have otherwise shaped the evolution of our courts, tribunals, workplaces and neighbourhoods in recent years. Why should parliament be the exception?

To adopt the words of the distinguished former Senator Fred Chaney, we senators need to observe what he describes as a 'degree of enforced reasonableness',⁸ or good governance in the future will be impaired. This will require a very different style of politician and party politics. Self-preservation should be a strong enough motive for change, as 50 years from now, only institutions that can adapt will have survived.

⁷ Joint Committee on Constitutional Review, *Report*, AGPS, 1959.

⁸ Fred Chaney, 'Bicameralism Australian style: governing without control of the upper house', *The Parliamentarian*, vol. 69, 3 July 1988, p. 170.